

CALIFORNIA ENERGY COMMISSION

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**State of California
Energy Resources
Conservation and Development Commission**

In the Matter of:)	Docket No. 97-AFC-1
)	
Application for Certification)	
for the High Desert Power Project)	
_____)	

**RESPONSE OF COMMISSION STAFF TO PETITION
FOR RECONSIDERATION OF COMMISSION DECISION FOR
THE HIGH DESERT POWER PROJECT**

Introduction

On May 3, 2000, the Energy Commission certified the High Desert Power Project (HDPP). On June 2, 2000, Gary Ledford, an intervenor in the Application for Certification proceeding, filed a Petition for Reconsideration of the Commission's decision (Petition). In an order issued the same date as Mr. Ledford's filing, the Chairman of the Energy Commission direct staff to serve and file responses to the Petition by June 14, 2000. This filing is staff's response.

I. Reliability

Mr. Ledford claims that the Commission's decision to approve the HDPP violates Warren-Alquist Act provisions that require the Commission to only certify reliable plants. The Commission acknowledges in its decision that its own regulations require it to make findings

about whether the plant is likely to be operated in a safe and reliable manner. In making those findings, the Commission concluded that a reliable source of water is necessary in order to allow the HDPP to operate reliably. Staff does not dispute this conclusion, and points out that in discussing the project's impact on water resources, the Commission found that the Mojave Water Agency (MWA) is entitled to 75,000 acre-feet of State Water Project (SWP) water each year. The Commission also discusses the fact that MWA has never taken more than 17,000 acre-feet of this entitlement. Therefore, MWA has a considerable entitlement to SWP water that it is not currently taking advantage of. This is water that MWA has the authority to sell to HDPP for cooling.

II. Findings In The Energy Commission's Decision To Certify The HDPP That The HDPP Complies With Applicable Laws Are Supported By The Evidentiary Record.

Mr. Ledford argues that the Commission Decision is deficient because it fails to include a finding that HDPP does not comply with applicable law. Specifically, he states that the Commission decision (and presumably the HDPP) violates the California Constitution (Cal. Const., art. X, § 2), various sections of the California Water Code, and one regulation because it allows the use of fresh inland waters for project cooling. However, there is nothing in the California Constitution that prohibits the use of fresh inland waters for power plant cooling. There *is* a prohibition against waste and unreasonable use of water, which Mr. Ledford believes is created by the HDPP's use of SWP water for cooling. Mr. Ledford ignores the fact that no statute, no regulation, and no decision of a California court has determined that such use represents waste or unreasonable use.

Similarly, the project does not conflict with the provisions of the Water Code sections cited by Mr. Ledford. In sum, these sections state that the use of potable domestic water for certain non-potable uses (including cooling towers) constitutes waste if recycled water of adequate quality is available at a reasonable cost and its use will not adversely affect downstream users, the public,

or the environment. The Commission Decision accurately notes that the use of reclaimed water was considered in the proceeding. However, the parties ultimately rejected this proposal because the California Department of Fish and Game indicated that the use of this water, which currently provides flow to the Mojave River, would cause significant adverse effects to riparian habitat along the River. Therefore, the HDPP and the Energy Commission decision comply with these provisions of the Water Code.

Mr. Ledford also states that the Energy Commission decision is deficient because it doesn't include a requirement contained in Title 23, California Code of Regulations, section 761. This section was repealed in 1999 and is inoperative.

Finally, Mr. Ledford claims that the Commission Decision does not comply with the requirements of State Water Resources Control Board Resolution 75-58. The applicability of this policy to the Commission's AFC proceedings was discussed extensively by staff in the Elk Hills proceeding; we refer to those filings in our comments rather than reproduce our comments in full. In any event, staff did provide a complete discussion of this issue during hearings, including a summary of the several alternatives sources of water it evaluated. Staff also discussed the fact that the use of reclaimed water was precluded by environmental concerns (in one instance) and by unavailability (in others), as well as the fact that there are significant additional costs associated with dry cooling and that the project's potential environmental impacts are fully mitigated by the Conditions of Certification. Staff believes that this evidence as well as other evidence in the record provide ample support for the discussion and the conclusion about this policy in the Commission decision.

III. The Water Impacts Of The HDPP Were Extensively Evaluated And The Energy Commission's Findings On This Issue Are Fully Supported By The Evidentiary Record.

Mr. Ledford claims that the Energy Commission decision is defective because the record does not contain sufficient information about the effect of State Water Resources Control Board Resolution 75-58 on the HDPP. However, as discussed above, this statement is incorrect, as staff did conduct an assessment of this policy and its effect on the HDPP, and the Commission referenced that discussion in its final decision. Mr. Ledford also contends that Water Code §§ 237 and 462 require studies on the availability of water for thermal electric powerplant cooling purposes. However, the first section cited by Mr. Ledford was repealed in 1992; the second is a broad directive to the California Department of Water Resources to evaluate these issues generally. Moreover, as discussed above, staff did investigate the availability of a variety of reclaimed water for the HDPP and determined that such water was either unavailable, or in one instance, that its use would create a significant adverse impact on the riparian habitat of the Mojave River. Thus, even though these statutes do not require the Energy Commission to conduct an exhaustive investigation of the availability of reclaimed water or other sources of water for the HDPP, staff did thoroughly evaluate the possibility of alternative sources of water and determined that none were feasible. These efforts are well documented in the evidentiary record of this proceeding and referenced by the Commission in its final decision.

Mr. Ledford's argument that the Energy Commission cannot certify the HDPP until there is a document from the state Water Resources Control board similar to a determination of Compliance from an Air District is equally meritless. There are no permit requirements applicable to the supply of water this project. The only water-related permit that will be required is associated with the Report of Waste Discharge submitted to the Regional Water Quality Control Board. The Regional Board has indicated that they will issue this once the Commission's decision becomes final and the Board can use the Commission decision to comply

with CEQA requirements. The Regional Board participated in the AFC process and did not indicate any concerns about the use of State Water Project water by the HDPP.

IV. The Energy Commission Should Not Stay Its Decision To Wait For Rendering A Ruling By The California Supreme Court In The Matter Of Barstow v. Mojave Water Agency.

Mr. Ledford claims that the Energy Commission should stay its decision because the California Supreme Court recently held oral argument in the case of Barstow v. Mojave Water Agency. This is an appeal from an appellate court decision on the adjudication that established the requirements for groundwater requirements in the area of the project. Staff sees no reason for this delay. We believe that the outcome of that case will not have a direct effect on the Commission's proceeding. To the extent that the groundwater management strategies that are currently in effect are amended as a result of this decision in a way that effects the procurement of water by the HDPP (which we consider unlikely), the applicant may need to changes its water plan. In that case, a post-certification amendment, which includes compliance with CEQA, may be required. Given the speculative nature of such changes, as well as the fact that the Commission has a mechanism in place, that includes compliance with CEQA, for addressing project changes, we do not recommend delaying the project to await the Supreme Court's decision.

V. The Commission Decision Contains Thorough Responses to All Public Comments.

Mr. Ledford states that the evidentiary record underlying the Commission Decision is flawed because it fails to provide meaningful response to public comments. Mr. Ledford is incorrect; each and every point raised by Mr. Ledford was addressed in the Presiding Member's Proposed

Decision, and in the Commission Decision to certify the project. What Mr. Ledford is really saying that is that because the Commission's doesn't agree with his views on the water issues, it failed to provide a "meaningful" response to public comments. He ignores the fact that the record demonstrates that the HDPP Committee carefully evaluated each of his points and rejected them after careful consideration. This is not a failure to respond to comment; it is a conclusion reached after conscientious deliberation that the positions of other parties are more strongly supported by the evidentiary record in the case.

The first comment Mr. Ledford claims was ignored concerns State Water Resources Control Board Resolution 75-58. However, as discussed above, this issue was addressed by staff in its oral and written testimony, which were referenced by the Commission in its final decision. Thus, the comment was not ignored; the Commission simply disagrees with Mr. Ledford that this policy mandates dry cooling for the HDPP. Mr. Ledford also asserts that the Commission ignored his comments that the water proposal creates an inequity by allowing HDPP more water than those who pump groundwater in the project area. The Commission did respond to this issue by correctly pointing out that it would be inappropriate for the Energy Commission to assume that such decisions made by local agencies were made contrary to law. The decision correctly concludes that policies affecting how water is used in the High Desert area is not within the Commission's jurisdiction. Again, the Commission has not ignored Mr. Ledford's comment, but has indicated its disagreement with his assessment of the applicability of State Water Resources Control Board Resolution 75-58.

The second comment Mr. Ledford claims the Commission ignored is that the local water agencies have not conducted a CEQA analysis for the approvals they expect to give to the project after it is licensed by the Energy Commission. Mr. Ledford is correct that the local water agencies have not conducted a CEQA analysis to evaluate any phase of this project. That analysis is contained in the Commission's decision because the Commission is Lead Agency for the project. Other agencies' responsibilities to comply with CEQA for a future decisions on other projects are not

germane to this decision on this project. Nonetheless, to address Mr. Ledford's concern, the Commission decision includes a discussion of the exact uses of the water treatment facility and project wells that were evaluated as part of the Commission's process. The decision even contains a Condition of Certification that states that use of the facility for injection and subsequent withdrawal is subject to a CEQA review by the appropriate Lead Agency. Again, Mr. Ledford's claims are unsupported.

Mr. Ledford also claims that the Commission did not respond to his comment that it has not conducted an evaluation of cumulative impacts or of growth-inducing impacts. He attempts to bolster his claim by citing a single sentence from staff comments about the fact that pre-existing environmental documents did not evaluate these effects. However, as made clear in the final decision, the Commission did not rely on these documents to evaluate either types of effects, but conducted its own assessment, based on the testimony of staff and other parties. The Commission's decision and the transcript from the final hearing contain an extensive discussion of this issue.

Mr. Ledford states that the Commission failed to respond to his comment that the HDPP water facilities are oversized, and will be used to provide water the George air Force Base, which was not evaluated by the Commission. Mr. Ledford ignores the fact that the Commission did respond to this comment, both in discussing the appropriate scope of the project and in its specific discussion of the HDPP's effect on water resources.

Finally, Mr. Ledford avers that the Commission did not respond to his comment about the applicability of the California Constitution, Article. X, § 2 to this case. However, as discussed above, the California Constitution does not establish any specific requirements that apply to this case. The Commission's failure to include an explicit discussion of a Constitutional provision that has no direct bearing on this case is not error; it is a much-appreciated result of crafting a Commission decision that does not address irrelevant points.

VI. The Commission decision Includes an Evaluation of Dry Cooling and Its Environmental Attributes

Mr. Ledford cites the Commission's findings in the Sutter case, and claims that these demonstrate that dry cooling is "environmentally preferred". No one disputes that the use of dry cooling would use less water than wet cooling. However, the job of the Energy Commission is not to design an "environmentally preferred" project, but to evaluate AFCs that are filed and determine whether they create significant impacts, and if they do, impose mitigation measures. The Commission is also required to evaluate alternatives. In this instance, the Commission concluded that the use of alternative sources of water, such as reclaimed water was not feasible due to unavailability and potential environmental impacts, and that the mitigation contained in its decision is sufficient to prevent any adverse impacts in the area of water supply. As a result, the Commission did not mandate dry cooling. Would HDPP be a better project with dry cooling? Staff testified that dry cooling would be preferable from a water conservation standpoint. However, as the Commission points out in its decision, it will not require the applicant to use dry cooling unless such use prevents or avoids significant adverse impacts caused by wet cooling. Supported by the weight of the evidentiary record, the Commission concluded that there are not.

Conclusion

In conclusion, staff urges the Commission to deny Mr. Ledford's Petition for Reconsideration. We believe that the decision is legally sufficient and that any decision to further prolong these proceedings is both unnecessary and wasteful of public resources.

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Respectfully submitted,

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